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In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 2.

GRAVER TANK AND MFG. CO. INC.,
THE LINCOLN ELECTRIC COMPANY,
GRAVER TANK AND MFG. CORPORATION,
Petitioners,

vs.

THE LINDE AIR PRODUCTS COMPANY,
Respondent.

ON REHEARING.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND MEMORANDUM.

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Now Comes American Lecithin Company, Youngs Rubber Company and Frank B. Killian and Company, petitioners on motion, and move this honorable Court for leave to file a brief, Amicus Curiae, under the provision of Rule 27, paragraph 9, section 9c of the Rules of this Court, as amended on or about November 15, 1949.

F. O. RICHEY,
B. D. WATTS,
Attorneys for Petitioners on Motion.

MEMORANDUM.

The petitioners pray leave to file their Brief Amicus Curiae because of the importance of the doctrine or rule of equivalents in the patent law.

This doctrine has always been important in the patent law. In practically every patent infringement suit, the court has had to consider the range of equivalents to be accorded to the patent in suit.

This doctrine is important because it directly affects the large part of the public consisfing of all the inventors, patent owners, patent licensors and patent licensees, both present and prospective.

The decision in the above entitled action will be limited to this doctrine for it is the only point involved in the rehearing. Since the effect of the decision may go far beyond the issues or parties in this case, it is believed that representatives of the vitally interested public also should be heard on this doctrine.

The petitioners' Brief Amicus Curiae will deal generally with the doctrine of equivalents as it has been developed and applied throughout many years, and thus will not be confined to the specific facts of the present case as will be the parties' briefs.

The Constitution of the United States provides in Article I, Section 8, Paragraph 8, that Congress shall have the power

> "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

This language makes it clear that it is the "exclusive Right" to the "Discoveries" which is given to the inventors. It must be presumed that the patent statutes which followed the Constitution were drafted and enacted by the Congress in an effort to secure to the inventor the

"exclusive Right" defined in the Constitution. The doctrine of equivalents was an effort on the part of the Courts to carry out the intent of both the Constitution and the statutes and thereby to secure to the inventor that "exclusive Right."

The doctrine of equivalents in patent matters came to be part of the law for several reasons. The statutes required the inventor to describe and claim the invention within a limited time, now a year, after the first public use of the invention. Thus the words of description must be chosen at a time when the invention is new and may not be thoroughly or completely understood or before its capabilities are known. Furthermore, the words thus chosen must stand for the 17 year period comprising the patent term and the additional time the application is pending in the Patent Office before issuance of the patent. Also, the words chosen must survive the searching scrutiny of adversary contests long after the date of word choosing and in the light of the later progress in the field of the invention. That is, the words of description are frozen initially but the application, adaptation, understanding and knowledge of the invention may constantly change throughout a score of years. It is seldom, if ever, possible so to choose words which will survive such tests. In many cases, the invention was much broader in scope than appeared at the time the description and the claims were composed.

The doctrine of equivalents was adopted by the Courts to protect the inventor's exclusive rights in such cases against loss for failure to use adequate words of description. A repudiation of the doctrine would compel the inventor to choose such words at his peril, and would make the selection of words at least as important as the invention. The doctrine of equivalents is on the side of achievement, and it permits the Court to do equity in such cases by construing the patent and its claims from the viewpoint of substance or achievement.

The doctrine of equivalents is meritorious as is shown by the fact that it has been so generally adopted and so long followed by the Courts.

The petitioners' Brief Amicus Curiae also deals with the construction to be given an unambiguous patent claim, amplifies the points set forth herein above and includes other important points on the doctrine of equivalents together with the authorities.

It is therefore respectfully requested that because of the importance of the question, leave to file petitioners' brief be granted.

Respectfully submitted,

F. O. RICHEY,
B. D. WATTS,
Attorneys for Petitioners on Motion.